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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE IRVING NORMAN, JR.,
PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967

GEORGE IRVING NORMAN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GEORGE IRVING NORMAN, JR., Your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case, on January 29, 1968, affirming the United States District Court, Southern District of Ohio, Western Division, denial of Petitioner's Motion in the Nature of an Application for a Writ of Error Coram Nobis.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit entered January 29, 1968 (Appendix A, infra, pp. 31-34) is not officially reported.

The Opinion (Order) of the United States District Court, Southern District of Ohio, Western Division (Appendix B, infra, pp. 35-43) is not officially reported.

DATE OF JUDGMENT AND TIME OF ENTRY

The Judgment of the Court of Appeals for the Sixth Circuit was entered on January 29, 1968.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S. Code, § 1254(1).

QUESTIONS PRESENTED

Where an Indictment, purportedly charging Misprision of Felony, in violation of 18 U.S. Code, § 4, fails to charge a crime, and this issue is first raised after the sentence is served, by a Motion in the Nature of an Application for a Writ of Error Coram Nobis, can the Court, by a liberal interpretation of the language in the Indictment, amend such Indictment to add essential and substantive elements of the offense of Misprision of Felony in order to sustain the conviction.

Whether an evil motive or an intent to obstruct and hinder the due course of justice and to cause a felon to escape punishment is an essential element of the Federal offense of "Misprision of Felony" (18 U.S.C., § 4).

STATUTES INVOLVED

The Indictment in question purported to charge the Petitioner with a violation of 18 U.S.C., § 4, which reads as follows:

> "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall

be fined not more than $500 or imprisoned not more than three years, or both."

The Indictment also refers to Section 2312, Title 18, U.S.C.(18 U.S.C., § 2312), which, as pertinent here, reads as follows:

"Whoever transports in interstate... commerce a motor vehicle... knowing same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

CONCISE STATEMENT OF CASE

On March 12, 1952, Stanley H. Mendelsohn, Special Agent, FBI, filed a complaint with the United States Commissioner in Dayton, Ohio, which charged that on February 16, 1952, at Dayton in the Western Division of the Southern District of Ohio, the Defendant did have knowledge of the actual commission of a felony cognizable by a court of the US in that he knew Wm. Moore transported a '48 Oldsmobile sedan, motor no.9-7001H from Chicago, Ill. to Greenville, O. and that Moore knew this car to be stolen and that he Norman, willfully concealed and did not report same to some judge or another authorized person as soon as possible.

A grand jury subsequently returned an Indictment which read:

"The Grand Jury charges:

"That GEORGE IRVING NORMAN, JR., the defendant herein, at Dayton, Ohio, within the Western Division of the Southern District of Ohio, having knowledge of the actual commission of a felony cognizable by a Court of the United States, to-wit: Section 2312, Title 18, U.S.C., Interstate transportation of a stolen 1948 Oldsmobile, Motor No. 9-7001H, from Chicago, Illinois, to Dayton,

Ohio, on February 16, 1952, the said William Moore well knowing the car to have been stolen; he, the said GEORGE IRVING NORMAN, JR., did on the 18th day of February, 1952, unlawfully conceal and fail to disclose or make known such felony as soon as might be to some one of the Judges of the United States District Court for the Southern District of Ohio, or other person in civil or military authority under the United States, and in furtherance of said unlawful concealment, the said GEORGE IRVING NORMAN, JR. took the following affirmative step to conceal the crime committed by the said William Moore in that he purchased Ohio registration tags No. 2571RZ using a duplicate Ohio Certificate of Title for another car, and placed these tags on the above stolen Oldsmobile.

A TRUE BILL."

(emphasis supplied)

To the foregoing Indictment, Petitioner was arraigned and entered a plea of guilty and was sentenced to one year and one day on September 11, 1952.

On July 13, 1966, Petitioner filed a MOTION IN THE NATURE OF AN APPLICATION FOR A WRIT OF ERROR CORAM NOBIS, the Petitioner having long prior thereto served his sentence. The grounds of said Motion were that 18 U.S.C., § 4 specifically requires that one have" ... knowledge of the actual commission of a felony cognizable by a Court of the United States...", and that the Indictment was legally insufficient to charge the Petitioner with a violation of 18 U.S.C., § 4, in that neither the Complaint nor the Indictment charged the Petitioner with having "knowledge" that the motor vehicle referred to in said Complaint and Indictment had been stolen, the only reference in the Complaint being"...

Moore knew this car to be stolen..." (emphasis supplied), and the only reference in said Indictment being that "... the said Wm. Moore well knowing the car to have been stolen...", there being no allegation in either said Complaint or Indictment charging the Petitioner with any knowledge that said motor vehicle had been stolen, and further, that said Indictment was insufficient and void for the reason that it contained no allegation that the Petitioner had an evil motive or "intent" to obstruct and hinder the due course of justice and to cause a felon to escape punishment.

Defendant maintained in the trial court (United States District Court, Southern District of Ohio, Western Division) and in the Court of Appeals for the Sixth Circuit, that the Indictment was void and that a judgment based on a plea of guilty to a void Indictment was a void judgment and could be lawfully cancelled.

Defendant's MOTION IN THE NATURE OF AN APPLICATION FOR A WRIT OF ERROR CORAM NOBIS was denied by the District Court (Appendix B, infra, p. 35), and on appeal, this judgment was affirmed by the Court of Appeals for the Sixth Circuit (Appendix A, infra, pp. 31-34).

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted because:

I.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS, BY ITS DECISION HEREIN, RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

II.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS, BY ITS DECISION HEREIN, DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

III.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS, BY ITS DECISION HEREIN, DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

I.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS, BY ITS DECISION HEREIN, RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

The Court of Appeals for the Sixth Circuit, in holding that the Indictment herein was sufficient, misapplied the rule that an Indictment will be construed liberally in favor of its sufficiency where objection to it is first made after verdict or judgment. Said rule pertains to "form" only, and the Court of Appeals for the Sixth Circuit applied said rule so as to add "substance" and essential elements of the offense of Misprision of Felony, which the Indictment attempted to charge. No allegations in the Indictment warranted the inferences drawn by the Court of Appeals for the Sixth Circuit to arrive at the conclusion that the Indictment was sufficient to sustain Petitioner's conviction, on a plea of guilty. Thus, the decision herein conflicted, with the decision by the Court of Appeals for the Fourth Circuit in Finn v. United States, 256 F.2d 304 (4th Cir., 1958), relied upon by the Court of Appeals for the Sixth Circuit in its decision

(Appendix A, infra, pp. 31-34), for the Court in Finn v. United States, supra, specifically recognized that a statement of the essential facts constituting the offense charged was indispensable to the validity of an Indictment, and that where a challenge was first made after verdict, in order for an Indictment to be sufficient, it was necessary that the facts appear in some form, or by a fair construction could be found within the terms of the Information (Indictment).

18 U.S.C., § 4 contemplates "knowledge" of the "actual" commission of a Federal felony, and Neal v. United States, 102 F.2d 643 (8th Cir., 1939), and Lancey v. United States, 356 F.2d 407 (9th Cir., 1966), both contemplate that the "principal" have committed and completed the felony alleged and that the defendant "... had full knowledge of that fact...". The indictment under consideration does not specify any felony committed by William Moore, except by the illogical reasoning that because he well knew a certain described vehicle to have been stolen, he stole same and transported same in interstate commerce. Albeit, since the principal (William Moore) is not charged with a Federal felony, the Indictment fails to charge the Petitioner with "knowledge" of the "actual commission" of such felony.

The decision herein is also in conflict with United States v. Manuszak, 234 F.2d 421 (3rd Cir., 1956), wherein the Court stated:

> "... Although after a verdict every intendment should be indulged in support of the count, neither the verdict nor the evidence supporting the verdict can be used as a basis for dispensing with the rule that the indictment must state all the essential ingredients of the crime. See Hagner v. United States, 1932, 285 U.S. 427, 433, 52 S.Ct. 417, 76 L.Ed. 861; United States v. Debrow, 1953, 346 U.S. 374, 376, 74 S.Ct. 113, 98 L.Ed.

92; United States v. Tornabene, 3 Cir., 1955, 222 F.2d 875; United States v. Amorosa, 3 Cir., 1948, 167 F.2d 596, 598."

See also Nicholson v. United States, 79 F.2d 387 (8th Cir., 1935), and cases therein cited. A Defendant who pleads guilty to an Indictment still has left to him the objection that the Indictment does not allege the essential ingredients of the crime with which he is charged (Nicholson v. United States, supra; United States v. Ury, 106 F.2d 28 (2nd Cir., 1939); and Oesting v. United States, 234 Fed. 304 (C.C.A. 9, 1916). The true test of the sufficiency of an Indictment is whether it contains the elements of the offense intended to be charged (Hagner v. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 76 L.Ed. 861 (1931). The omission of matters of substance is not aided or cured by the verdict (Harris v. United States, 104 F.2d 41 (C.C.A. 8, 1939)), and no essential element of the crime can be omitted without destroying the whole pleading, and no omission can be supplied by intendment, or implication, and a charge must be made directly and not inferentially or by way of recital (Russell v. United States, 369 U.S. 749, 765, 82 S.Ct. 1038, 8 L.Ed.2d 549 (1962); White v. United States, 67 F.2d 71 (10th Cir., 1933); and, Neufield v. United States, 118 F.2d 375, 389 (C.A.D.C., 1941), cert. den. 315 U.S. 798, 62 S.Ct. 580, 86 L.Ed. 1199.)

In United States v. Thompson, 356 F.2d 216 (2d Cir., 1956), the Court recognized that an Indictment which was so defective that by no reasonable construction it could be said to charge the offense for which the conviction was had, amounted to a clear showing of substantial prejudice to the accused.

In Kane v. United States, 120 F.2d 990 (8th Cir., 1941), it was recognized that where an accused made no attack upon the Indictment and

proceeded to trial, an appellate court was concerned with whether or not the accused ought not fairly to have been allowed to submit himself to a trial on the Indictment, and that an Indictment would be examined to determine as to whether or not it constituted a sufficient foundation for a judgment, and adequately protected Defendant from another prosecution for the same offense, and as to the testing of the sufficiency of the Indictment for these purposes, the Court stated:

> "... there is no sound reason why all the facts and elements of the crime should be required to be stated directly. When this stage of the inquiry is reached, reasonable inferences and clear implications from the allegations are made a legitimate aid to the Indictment..." (emphasis supplied)

In Lucas v. United States, 158 F.2d 865 (4th Cir., 1946), the Court recognized that even where the sufficiency of an Indictment had not been raised upon trial, an Indictment would be held insufficient where, by no reasonable construction, the Indictment could be said to charge the offense for which the Defendants were convicted.

Muench v. United States, 96 F.2d 332 (8th Cir., 1938), relied upon by the Court in Lucas v. United States, supra, recognized the test to be applied in determining the sufficiency of an Indictment, if objected to for the first time on appeal, as being a reasonable construction of the Indictment.

Technical imperfections in an Indictment will be ignored, when an Indictment is challenged for the first time in an appellate court, but this rule applies only "if the necessary facts can be drawn by reasonable inference from the allegations of the Indictment" (Elder v. United States, 142 F.2d 199 (9th Cir., 1944).

In reliance upon Hagner v. United States,

supra, the Court in Stapleton v. United States, 260 F.2d 415 at 418 (9th Cir., 1958), in regards to the necessity of an Indictment to allege all the elements of the offense, although noting that an Indictment is sufficient where "... the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment...", the Court further stated:

> "... in other words, all the essential elements need not be stated directly if they are necessarily implied. Hopper v. United States, supra, 142 F.2d at page 184..." (emphasis supplied)

Conversely, if "essential elements" are not stated "directly" and not " ... necessarily implied...", the Indictment is fatally defective, fails to charge an offense and is insufficient to sustain the judgment of conviction (United States v. Carll, supra; Harris v. United States, supra; Walker v. United States, 342 F.2d 22 (5th Cir., 1965); United States v. Hess, 124 U.S. 483, 8 S.Ct. 571, 31 L.Ed. 516 (1888)).

No "reasonable construction" (Lucas v. United States, supra; Muench v. United States, supra) of the Indictment under consideration warrants the conclusion that the Defendant is charged with possession of knowledge of the actual commission by William Moore of Interstate transportation of a stolen motor vehicle.

In the Courts below, the Government's position was that it was not essential that all the elements of an offense be stated directly in an Indictment, and that "... reasonable inferences will be indulged to sustain the indictment..." (emphasis supplied). With this rule, Petitioner has no quarrel, but there are no allegations in the Indictment from which "reasonable inferences" can be drawn that the Indictment intended to charge the Defendant with knowledge of the actual commission of Interstate transportation of a

stolen motor vehicle by William Moore. An "inference" is "... not a conclusion or thought that has no reasonable basis for its existence" (United States v. L. D. Caulk, 126 F. Supp. 693, 702 (D.C. Del., 1954)). An "inference" is a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts (Black's Law Dictionary (3rd Ed.)); see also, Juchert v. California Water Ser. Co., 106 P.2d 886, 890 (S.Ct. Cal., 1940); Wilder v. W. T. Grant, 132 N.W. 2d 852, 853 (S.Ct. Minn., 1965); State v. Meany, 115 N.W. 2d 247 (S.Ct. Minn., 1962); Seavey v. Laughlin, 57 A. 796 (S.Ct. Me., 1904); and, 21 W.&P. 564, et seq. for numerous cases regarding definition of "inference" and particularly, at page 572 for cases holding that an inference is a "reasonable conclusion or deduction" and at Id. 576 for cases holding that supposition and guesswork is not included in drawing inferences. Cf. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1942), in which although considering a statutory presumption, the Court noted:

> "... Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience..."

and the Court further noted:

> "... where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." (319 U.S. 468)

This reasoning is equally applicable here, and

the fact that in the Indictment, it was simply alleged that "... the said William Moore well knowing the car to have been stolen..." did not warrant the Court of Appeals for the Sixth Circuit drawing the inference that the Indictment "identifies the driver of the vehicle", and the further "inference" that William Moore was the one who transported said vehicle in Interstate commerce, knowing same to have been stolen, and to conclude from these inferences upon inferences that the Petitioner was sufficiently charged with knowledge "... of the actual commission" by William Moore of Interstate transportation of a stolen motor vehicle.

In Boyett v. United States, 48 F.2d 482 (5th Cir., 1931), the Court stated:

> "... the mere knowledge that an offense is being committed is not equivalent to participation with criminal intent..."

In United States v. Di Re, 159 F.2d 818 (2nd Cir., 1947), the Court had under consideration the legality of Di Re's arrest, it appearing that he was merely present when two other individuals were engaged in the selling of counterfeit gasoline ration coupons. Although recognizing that the failure to denounce a felony is itself a crime (Misprision of Felony), the Court noted that the law does not make one a participant in crimes which one does not denounce, and further, that nobody would assert that all the spectators of a crime may be arrested as participants. The Court then noted that:

> "... even though riding in a car with two such offenders be evidence of acquaintance, or possible friendship, with them, it would be altogether unwarranted to carry the inference further than complaisance...."

which rule has particular application to the Indictment under consideration, in that the allegation that "... the said William Moore well know-

ing the car to have been stolen..." did not by any "reasonable construction" warrant the "inference" drawn by the Court of Appeals for the Sixth Circuit, that the Indictment "... identifies the driver of the vehicle ..." (Appendix A, infra, p. 31), and from this "inference", the further "inference", in effect, that William Moore was charged in said Indictment with Interstate transportation of a stolen motor vehicle, and from this "inference" upon an "inference", the fact that because the Indictment alleged the Defendant had knowledge of the actual commission of a felony cognizable by a court of the United States, to-wit: Section 2312, Title 18, U.S.C., Interstate transportation of a stolen 1948 Oldsmobile, that the Indictment was sufficient to charge the Defendant with "... having knowledge of the actual commission..." of the felony of Interstate transportation of a stolen motor vehicle, and that said William Moore was the one who stole or, at least, transported same in Interstate commerce.

There is probably no criminal offense known to Federal criminal jurisprudence where "knowledge" on the part of the Defendant is so vital an element of the offense as in "Misprision of Felony", (18 U.S.C., § 4). 18 U.S.C., § 4 makes this clear, in that it does not simply state:

> "... Whoever, having knowledge of the ... commission of a felony cognizable by a court of the United States..."

but goes further and requires that one have "... knowledge of the actual commission of a felony..." (emphasis supplied). 18 U.S.C., § 2312 provides:

> "Whoever transports in interstate... commerce a motor vehicle... knowing same to have been stolen shall be fined not more than $5,000 or imprisoned not more than 5 years, or both." (emphasis supplied)

This offense consists of four essential elements

(56 A.L.R.2d 1309 at 1324, et seq.), [1] the fact that a motor vehicle had been stolen, [2] and was transported in interstate commerce, [3] the fact that defendant knew that said motor vehicle had been stolen, [4] and the fact that the defendant transported said motor vehicle with a dishonest intent. The Indictment herein charged William Moore only with the third element, i.e., the fact that he knew the car to have been stolen. Albeit, the Indictment did not charge William Moore with Interstate transportation of a stolen motor vehicle, and no allegation in the Indictment warranted the imputation of the knowledge of William Moore (that said vehicle had been stolen) to the Defendant, let alone the imputing to the Defendant "... knowledge of the actual commission..." of the Federal felony of Interstate transportation of a stolen motor vehicle by the said William Moore.

II.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS, BY ITS DECISION HEREIN, DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Although the Federal "Misprision of Felony" statute (18 U.S.C., § 4) was originally enacted in 1790 (1 Stat. 113, § 6) and has been in force in one form or another ever since, counsel for Petitioner has found no case, where this Court has construed this statute.

An important question of Federal law which has not been, but should be, settled by this Court involving the Federal "Misprision of Felony" statute (18 U.S.C., § 4) is:

WHETHER AN EVIL MOTIVE OR AN INTENT TO OBSTRUCT AND HINDER THE DUE COURSE OF JUSTICE AND TO CAUSE A

FELON TO ESCAPE PUNISHMENT IS AN ESSENTIAL ELEMENT OF THE FEDERAL OFFENSE OF "MISPRISION OF FELONY" (18 U.S.C., § 4)

Petitioner below maintained that an essential element of the offense of "Misprision of Felony" was evil motive or an "intent" on the part of Defendant to obstruct and hinder the due course of justice and to cause a felon to escape punishment (Appendix A, infra, pp.31-34).

Admittedly, 18 U.S.C., § 4 does not spell out the element of an intent to obstruct and hinder the due course of justice and to cause a felon to escape unpunished, but this is not the test as to whether or not such an element of "intent" is essential. In United States v. Carll, 105 U.S. 611, 26 L.Ed. 1135 (1881), one issue involved was whether or not the Indictment, setting forth the offense in the language of the statute, without further alleging that the Defendant knew the instrument involved to be false, forged, etc. (Sec. 5341 of the Revised Statutes) was sufficient, after verdict, to warrant judgment thereon. This Court stated:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enabled the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent (citing cases).
>
> "... the offense at which it [Sec. 5341, Rev. Stat.] is aimed is similar to the common

law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the Instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

"This indictment, by omitting the allegation ... that the defendant knew the instrument which he uttered to be false, forged and counterfeit, failed to charge him with any crime. The omission is a matter of substance, and not a 'defect or imperfection in matter of form only,' . . . Therefore, the question of sufficiency of the indictment must be (answered in the negative)" (emphasis supplied)

In United States v. Sanges, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445 (1891), the Court stated:

"This statute [Judiciary Act of 1891], like all acts of Congress, and even the Constitution itself, is to be read in the light of the common law, from which our system of jurisprudence is derived (citing cases). As aids, therefore in its interpretation, we naturally turn to the decisions in England and in the several states of the Union, whose laws have the same source" (emphasis supplied)

and the Court cited and relied upon a great number of decisions by state courts. See also, Schick v. United States, 295 U.S. 65, 69, 24 S.Ct. 826, 49 L.Ed. 99 (1935), and cases therein cited, for the proposition that the common law "is the system from which our judicial ideas and legal definition are derived."

In Morrissette v. United States, 342 U.S.

246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), the Court had under consideration whether or not a criminal intent was an essential element of an offense under 18 U.S.C., § 641, which provided that "whoever embezzles, steals, purloins, or knowingly converts" property of the United States is punishable by fine and imprisonment. The Court stated:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion...
>
> "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law..." (emphasis supplied)

And the Court further stated:

> "Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution; the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, ... State courts of last resort, on whom fall the heaviest burden of

interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses...

"Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute. Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act ...

"The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative...

"... And where Congress borrows term of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed...

"We hold that mere ommission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced." (emphasis supplied)

and the Court further stated, at 342 U.S. 265, that:

"... In view of the care that has been bestowed upon the subject, it is significant that we have not found, nor has our attention been directed to, any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law" (emphasis supplied)

In Walker v. United States, 342 F.2d 25 (5th Cir., 1965), the Court agreed with the appellant that the trial court erred in failing to charge an "intent" as to count six charging him with theft from the mails, the Court stating:

"... The count is based on 18 U.S.C. § 1708, which does not mention intent. The case of Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), distinguishes between crimes at common law and those not so considered, and stands for the proposition that if intent was a necessary element of a crime at common law, it is still a requisite of the offense, even if the crime has been codified into a statute where it is not mentioned. Inasmuch as theft was a crime at common law requiring intent the law still considers intent to be a necessary element of the crime, and the jury should have been so charged. The failure to do so was plain error."

In United States v. Anderson, 45 F.Supp. 943 (D.C. Mich., 1942), the Court in construing a statute relating to larceny recognized the offense was taken from the common law, and that:

"This means of course, that in interpreting the statute, we may apply the princi-

ples governing the common law crime of larceny, as interpreted by the courts of various states" (emphasis supplied)

Thirty-two years after the original Federal Misprision of Felony statute was enacted, in 1882, Chief Justice Marshall in Marbury v. Brooks, 7 Wheat. 556, 575, 5 L.Ed. 522, stated:

> "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man..."

Does this not indicate that there must be an "evil intent" in withholding such information? Defendant submits it does when considered in context with the rest of the decision, and especially with the statement that:

> "If the notes were to be taken up on condition that the holders would forebear to prosecute the criminal, or if the repayment of the money advanced were to depend upon his escape from prosecution, the validity of the contract might well be questioned..." (op. cit. 575)

In United States v. Worcester, 190 F.Supp. 548, 566 (D.C. Mass., 1960), the Court stated:

> "To suppose that Congress reached every failure to disclose a known federal crime, in this day of myriad federal tax statutes and regulatory laws, would impose a vast and unmeasureable obligation. It would do violence to the unspoken principle of the criminal law that 'as far as possible privacy should be respected.' There is 'a strong reluctance on the part of judges and legislators to sanction invasions of privacy in the detection of crime.' ..."

As to Petitioner's contention that an intent to obstruct and hinder the due course of justice was

an essential element of the offense of Misprision of Felony, the District Court below stated:

> "... This Court is not concerned with the misprision of felony statute of Vermont but is only concerned with the Federal Statute and the requirements it prescribes. Accordingly, this allegation of legal insufficiency is not well taken."[1] (Appendix B, infra, p. 39)

The Court of Appeals below, although recognizing that the sufficiency of the Indictment herein was challenged because it contained no allegation regarding "intent", side-stepped the issue by merely noting that the elements of the offense "... as fixed by the statute are threefold..." (Appendix A, infra, p. 33).

That "Misprision of Felony" was a crime at common law and one of rather ancient origin is undisputed (See: MULR 3:389; 6 S.C.L.Q. 87 and 63 U.S.L. Rev. 621 (1920)).

The sufficiency of an Information to charge "Misprision of Felony" was under consideration in State v. Wilson, 80 Vt. 249, 67 A. 533 (1907), wherein the Information was challenged as defective in that it contained no allegation "that the respondent intended to obstruct and hinder the due course of justice and to cause a felon to escape unpunished...". The Vermont Court stated:

> "On the question of intent, we quite agree with Mr. Bishop that in principle the motive prompting the neglect of a misprision must be in some form evil as respects the administration of justice. I Bish. Cr.L.,

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[1] The Court had reference to the case relied upon by Petitioner of State v. Wilson, 80 Vt. 249, 67 A. 533 (1907), which involved not a statute of Vermont, but the common law offense of Misprision of Felony.

§ 721 a. And, where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment or information and proved. 1 Chit. Cr. L. 233. See also, 2 Chit. Cr. L. § 232; Bish. Directions and Forms, § 129" (emphasis supplied)

In 1 Bish. Cr. L., § 721 a (9th Ed.), it is stated:

"Intent. -- It would seem in principle that the motive prompting the neglect of a misprision should be in some form evil as respects the administration of justice; for example, to prevent the offender's punishment or to withhold due aid from the government ..." (emphasis supplied)

In Chit. Cr. L. 232, a suggested form of indictment for "Misprision of Felony" is set forth and clearly indicates that the defendant must have an "evil mind", and an intent "... to obstruct and hinder the due course of law and justice...".

In Commonwealth v. Lopes, 61 N.E. 2d 849 (Mass., 1945), the Court stated:

"... The only American case in a court sitting in banc that we have found in which the offense was declared to exist in this country at common law, but with the limitations that 'the motive prompting the neglect of a misprision must be in some form evil as respects the administration of justice' and that the evil motive must be alleged in the indictment, is State v. Wilson, 80 Vt. 249, 67 A. 533, 534" (emphasis supplied)

The Court in Lopes further stated:

"... If misprision of felony exists in this Commonwealth, we think that the limitations stated in State v. Wilson, 80 Vt. 249, 67 A. 533, apply, and that an evil motive to prevent or delay the administration of justice must be shown..." (emphasis supplied)

In State v. Michaud, 114 A.2d 353 (Sup. Jud. Ct. Me., 1955), an Indictment under the Maine statute which was all but identical to the federal statute was considered, and was held insufficient for failure to contain allegations sufficiently charging the defendant with "knowledge of the actual commission of a felony". Also, it is interesting to note that the Indictment did allege:

> "... with intent thereby to hinder the due course of justice and to cause the aforesaid Simonne Lauze to escape unpunished."

In State v. Biddle, 124 A. 804 (Ct. Ten. Sess. Del., 1923), an Information under the common law definition of the offense of "Misprision of Felony" alleged:

> "... That Ida Biddle ... by devising and intending to obstruct and hinder the due course of justice, and to cause the said Steve Jankovic to escape unpunished for the said offense ..."

Counsel has found no Federal Misprision of Felony case in which an Indictment was challenged on the specific ground here raised. However, in Bratton v. United States, 73 F.2d 795 (10th Cir., 1934), the Court, in construing the words "conceal and" in the Misprision of Felony statute, stated that if any meaning were to be given to said words, the Indictment must allege something more than mere failure to disclose, the Court stating that there must be some affirmative act of concealment:

> "... such as suppression of the evidence, harboring of the criminal, intimidation of witnesses, or other positive act designed to conceal from the authorities the fact that a crime had been committed. Furthermore, some such interpretation is necessary to rescue the act from an intolerable oppressiveness and to eliminate a serious question of constitutional power. Whatever may have been the case in 1790, when federal felonies

were few, the act if otherwise construed would be but another unworkable and unenforceable law in latter days..." (emphasis supplied)

In United States v. Worcester, supra, at 190 F. Supp. 565-566, the Court, in discussing whether or not there was a crime at common law of misprision of felony "... without actively concealing it, or hindering the law enforcement officers ...", stated:

"... Most of the cases customarily cited to show that there was at common law such a crime as misprision of felony involve interference with officers of the law. This is true of every early English case cited by Mr. Justice Lummus in Com. v. Lopes, 318 Mass. 453, 61 N.E.2d 849. Or the early cases involve aid to a felon or active concealment of him. See Lady Lisle's case described in Campbell, Lives of The Chancellors, vol. 3, pp. 543-545, and Stephen, History of The Criminal Law, vol. I, p. 413, vol. II, p. 234. See Deborah Churchill's case, Newgate Calendar, (Navarre Society; London, 1926) vol. II, pp. 206, 208." (emphasis supplied)

In United States v. Chandler, 380 F.2d 993 (2d Cir., 1967), Chandler had one half of a singed draft card, which he obtained at a rally held for purpose of burning draft cards in protest of the war in Vietnam, which remnant he had kept for eleven months in a safe place, and he had kept in his possession this key piece of evidence knowing of the Indictment and pending trial of Edelman (to whom the draft card originally belonged and who had torn same in two). United States v. Chandler, supra, involved an appeal from a conviction for criminal contempt, when Chandler refused to answer the trial judge's question at the trial of Edelman as to the cir-

cumstances under which he had received or found the half of the draft card which he possessed. Chandler's asserted reason for his silence was his Fifth Amendment privilege, on the ground that he sensed possible prosecution for being an accessory after the fact, in violation of 18 U.S.C., § 4 and for misprision of felony, in violation of 18 U.S.C., § 4. The Government argued that under these statutes "Possession of the remnant could have been criminal only if Chandler thereby affirmatively intended to protect Edelman from prosecution", the clear inference in the Government's argument being that an evil motive was essential or that it was essential that Chandler "... affirmatively intended to protect Edelman from prosecution...".

In Miller v. United States, 230 F.2d 486 (5th Cir., 1956), at 489, footnote 7, the Court stated:

> "Interestingly enough, apparently because of the heavy burden of showing a concealment and affirmative acts, the annotations indicate no conviction for misprision ever affirmed" (referring to 18 U.S.C., § 4) (court's emphasis)[2]

which is indicative that the Court had in mind by use of the phrase "affirmative acts" (which phrase is not used in 18 U.S.C., § 4) that there must be additional essential elements not specifically mentioned in 18 U.S.C., § 4, such as those recognized in Bratton v. United States, supra, and United States v. Worcester, supra.

The offense of misprision of felony is a crime which, by its very nature, common sense dictates would require an evil intent, especially in this day and age of myriad federal tax statutes,

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[2]The only apparent exception since that time being the very recent case of Lancey v. United States, 356 F.2d 407 (5th Cir., 1966).

which, to paraphrase the language of United States v. Worcester, supra, at 190 F. Supp. 566, "to suppose that Congress reached every failure to disclose a known federal crime... would impose a vast and immeasurable obligation...", which, to paraphrase the language from Marbury v. Brooks, supra, "... is too harsh for man", and an interpretation which requires a specific evil intent as an element of the offense, in the language of Bratton v. United States, supra, "... is necessary to rescue the act from an intolerable oppressiveness and to eliminate a serious question of constitutional power...".

III.

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS, BY ITS DECISION HEREIN, DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The decision by the Court of Appeals for the Sixth Circuit herein conflicts with the decisions laid down by this Court in United States v. Hess, 124 U.S. 483, 8 S.Ct. 571, 31 L.Ed. 516 (1888), United States v. Cruikshank, et al., 92 U.S. 542 23 L.Ed. 588 (1875), Hagner v. United States, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932)[3], and, Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 549 (1962)[4].

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[3]Where the Court in 285 U.S. 427 specifically recognized that "...The true test of the sufficiency of an indictment is ... whether it contains the elements of the offense intended to be charged...".

[4]Where, once again, this Court at 369 U.S. 763, recognized that the first of the two criteria by which the sufficiency of an Indictment was to be measured was whether the Indictment "contains the elements of the offense intended to be charged...".

Smith v. United States, 360 U.S. 1, 9, 79 S.Ct. 991 3 L.Ed. 2d 104 (1959), recognized that "... the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules...", and it is fundamental that an Indictment must charge an offense (Grimsley v. United States, 50 F.2d 509, 511 (5th Cir., 1931); Michener v. United States, 170 F.2d 973 (5th Cir., 1948), as examples). See also, State v. Michaud, 114 A.2d 352 (Sup. Jud. Ct. Me., 1955), involving the sufficiency of an Indictment under the Maine Misprision of Felony statute, and which held:

> "... The want of a direct allegation of anything material in the description of the substance, nature, or manner of the offense cannot be supplied by intendment or implication..."

The Court of Appeals for the Sixth Circuit also violated the principle announced in Tot v. United States, supra, because the Indictment under consideration contained no allegations, to paraphrase the language from the Tot case, supra, providing a "... rational connection between the facts alleged in the indictment and the ultimate facts presumed..." by the Court of Appeals for the Sixth Circuit that said Indictment charged William Moore with the Interstate transportation of a stolen motor vehicle and Petitioner with actual knowledge that said vehicle had been stolen and that William Moore had actually committed the felony of Interstate transportation of said motor vehicle, knowing same to have been stolen.

The effect of the decision by the Court of Appeals for the Sixth Circuit herein was to amend the Indictment under the guise of liberally construing the Indictment after judgment. It is axiomatic that grand jury Indictments are not

subject to amendment by the Court or the prosecuting attorney, and consequently, the decision below is in conflict with United States v. Norris, 281 U.S. 619, 50 S.Ct. 424, 74 L.Ed. 1076 (1930), Ex Parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1886), and Dodge v. United States, 258 Fed. 300, 7 A.L.R. 1510, cert. den. 250 U.S. 660, 40 S.Ct. 10, 6 L.Ed. 1194 (1919).

The decision below is, in the language of Morrissette v. United States, supra, at 342 U.S. 250, "... inconsistent with our philosophy of law", and further, ignores the early recognized American compound concept of crime as constituting the concurrence of an evil-meaning mind with an evil-doing hand (Morrissette v. United States, supra, at 342 U.S. 251-252) and, by noting in its decision that the elements of the offense as fixed by the statute were three-fold, the Circuit Court ignored the rule that where common law crimes are codified and said enactments are silent on the subject of intent, this does not mean that such silence did away with the necessity of intent, and courts assume that the omission did not signify disapproval of the principle, but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation (Morrissette v. United States, supra, at 342 U.S. 252).

CONCLUSION

In affirming the District Court, the Court of Appeals for the Sixth Circuit, by its decision herein, has, under the guise of liberally construing the Indictment herein, after judgment, laid down a rule which eradicates substantial safeguards for those charged with serious crimes, i.e., that an Indictment must either directly or indirectly allege all of the essential elements of the offense sought to be charged, and has, by its

decision herein, in effect, held that subsequent to a judgment, a conviction will be sustained despite the fact that the Indictment neither states directly or indirectly the essential elements of the offense. The decision by the Court of Appeals for the Sixth Circuit has established a rule that because one may have knowledge that a motor vehicle was stolen, that possession of such knowledge supports the conclusion that the person possessing same is not only the driver of the stolen motor vehicle, but that he also transported same in Interstate commerce, and imputes knowledge by one individual to another when the allegations in an Indictment fail to disclose any facts warranting a logical connection for such imputation of knowledge.

The decision by the Court of Appeals for the Sixth Circuit herein ignores the basic and fundamental concept that grand jury Indictments cannot be amended by a Court or prosecuting attorney, and has, in effect, ruled that one who pleads guilty to an Indictment attempting to charge a felony stands a convicted felon, regardless of whether or not the Indictment charged a felony.

The decision below strikes at the very heart and fundamental concept of the administration of criminal justice in the United States.

Petitioner respectfully submits that the Petition for a Writ of Certiorari should be granted.

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APPENDIX A

Nos. 17640 and 17641

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

United States of America Plaintiff-Appellee, v. George Irving Norman, Jr., Defendant-Appellant.	On Appeals from the United States District Court, Southern District of Ohio, Western Division

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Decided January 29, 1968.

Before: Phillips, Edwards, and Combs, Circuit Judges.

Combs, Circuit Judge. The appellant entered a plea of guilty in 1952 in the United States District Court for the Southern District of Ohio to an indictment charging violation of 18 U.S.C. § 4,[1] misprision of felony. He was sentenced to

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[1] 18 U.S.C. § 4. Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

(The original misprison statute was part of the Crimes Act of 1790, First Congress, Second Session, and related to concealment of a felony upon the high seas or in other places within the

imprisonment for one year and one day, and has served his sentence. In October, 1966, he filed in the same court "Motion in the Nature of an Application for a Writ of Error Coram Nobis," seeking vacation and dismissal of the 1952 judgment of conviction. His application was denied and he appeals.

Before discussing the merits of appellant's application we look briefly to the nature of the remedy which he is pursuing.

While the writ of error coram nobis has been expressly abolished in civil proceedings (Rule 60(b) of the Federal Rules of Civil Procedure) it has survived in criminal practice by virtue of the fact that it has not been replaced by a statutory provision. Mathis v. United States, 246 F. Supp. 116 (DC N.C. 1965). It is an extraordinary writ and jurisdiction of the court to grant relief is of limited scope. United States v. Cariola, 323 F.2d 180 (3rd Cir. 1963). The writ is sufficient to invoke the jurisdiction of a court to set aside its judgment of conviction even when sentence has been fully served. United States v. Forlano, 249 F. Supp. 174 (DC N.Y. 1965), affirmed 355 F.2d 934 (2nd Cir. 1966).

The pertinent part of the indictment to which appellant pleaded guity reads:

> "That GEORGE IRVING NORMAN, JR., the defendant herein, at Dayton, Ohio, within the Western Division of the Southern District of Ohio, having knowledge of the actual commission of a felony cognizable by a Court of the United States, to-wit: Section

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exclusive jurisdiction of the United States. By the Act of March 4, 1909, the Sixtieth Congress, in codifying the Federal Criminal Code, amended the statute to include any felony cognizable by a court of the United States.)

2312, Title 18, U.S.C. Interstate transportation of a stolen 1948 Oldsmobile, Motor No. 9-7001H, from Chicago, Illinois, to Dayton, Ohio, on February 16, 1952, the said William Moore well knowing the car to have been stolen; he, the said GEORGE IRVING NORMAN, JR., did on the 18th day of February, 1952, unlawfully conceal and fail to disclose or make known such felony as soon as might be to some one of the judges of the United States District Court for the Southern District of Ohio, or other person in civil or military authority under the United States, and in furtherance of said unlawful concealment, the said GEORGE IRVING NORMAN, JR. took the following affirmative step to conceal the crime committed by the said William Moore in that he purchased Ohio registration tags No. 2571RZ using a duplicate Ohio Certificate of Title for another car, and placed these tags on the above stolen Oldsmobile."

Appellant contends that the indictment was fatally defective in that it failed to charge that defendant had "knowledge" that the motor vehicle involved had been stolen; also that there is no allegation in the indictment that the defendant had the "intent" to commit a crime.

The elements of the offense as fixed by the statute are three-fold: (1) Knowledge of commission of a felony cognizable by a court of the United States, (2) failure to make known to the proper authorities the commission of the crime, and (3) concealment.

An indictment will be construed liberally in favor of its sufficiency where objection to it is first made after verdict or judgment. Hagner v. United States, 285 U.S. 427 (1932); United States v. Thompson, 356 F.2d 216 (2nd Cir. 1965); United States v. Laverick, 348 F.2d 708

(3rd Cir. 1965), Clay v. United States, 326 F.2d 196 (10th Cir. 1963); Finn v. United States, 256 F.2d 304 (4th Cir. 1958).

This indictment charges that the defendant had knowledge of the commission of a felony, to-wit: interstate transportation of a stolen motor vehicle; it specifies the title and section of the United States Code that was violated; specifies the year, make, and motor number of the vehicle involved; gives names of the cities between which the vehicle was transported; identifies the driver of the vehicle; and charges that the defendant took certain affirmative acts to conceal the crime.

Keeping in mind the applicable rule for the testing of an indictment after verdict or judgment, we are of the opinion the indictment properly charged appellant with the offense of which he was convicted. United States v. Debrow, 346 U.S. 374, 376 (1953).

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, :

Plaintiff, : CASE NO. 3318

v. : ORDER

GEORGE IRVING NORMAN, JR., :

Defendant :

This matter is before the Court upon a paper filed on behalf of George Irving Norman, Jr. entitled "Motion In The Nature Of An Application For A Writ Of Error Corum Nobis." Error Corum Nobis."

The aforesaid motion requests the Court to declare null and void the judgment of conviction and sentence entered on September 11, 1952 wherein defendant entered a plea of guilty to a one count indictment returned July 3, 1952 by the United States Grand Jury for the Southern District of Ohio, charging defendant, George Irving Norman, Jr., with a violation of 18 U.S.C.A. §4, dismiss the subject action and to further additional relief as the Court deems defendant entitled, including but not limited to, an expunging of the Court's records relating to the subject action.

As grounds for the relief requested in the motion defendant has alleged the following:

That the complaint and the indictment were

legally insufficient to charge defendant with a violation of § 4 of Title 18 U.S.A.C. in that neither the complaint nor the indictment charged defendant with having "knowledge" that the motor vehicle referred to in the complaint and indictment had been stolen,

That the indictment contained no allegations that defendant had an "intent" to obstruct and hinder the due course of justice and to cause the felon to escape punishment and

That defendant was not accorded adequate and effective legal representation or advice prior to entering his plea of guilty to the indictment; however, this allegation has been waived and it is not for the consideration of the Court.

The misprison (sic) of felony statute, § 4 Title 18 U.S.C.A., under which defendant was charged in the indictment under consideration reads:

> "Whoever having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined nor (sic) more than $500 or imprisoned not more than three years, or both."

A reading of the statute shows that there are three elements constituting the offense:

1. Knowledge of the actual commission of a felony cognizable by a court of the United States,
2. Failure as soon as possible to make known to a designated authority the commission of a felony and
3. Concealment.

The subject indictment reads as follows:

> "The Grand Jury charges:
>
> That GEORGE IRVING NORMAN, JR., the defendant herein, at Dayton, Ohio, within the Western Division of the Southern Dis-

trict of Ohio, having knowledge of the actual commission of a felony cognizable by a Court of the United States, to-wit: Section 2312, Title 18, U.S.C., Interstate transportation of a stolen 1948 Oldsmobile, Motor No. 9-7001H, from Chicago, Illinois, to Dayton, Ohio on February 16, 1952, the said William Moore well knowing the car to have been stolen; he, the said GEORGE IRING (sic) NORMAN, JR., did on the 18th day of February, 1952, unlawfully conceal and fail to disclose or make known such felony as soon as might be to some one of the Judges of the United States District Court for the Southern District of Ohio, or other person in civil or military authority under the United States, and in furtherance of said unlawful concealment, the said GEORGE IRVING NORMAN, JR. took the following affirmative step to conceal the crime committed by the said William Moore in that he purchased Ohio registration tags No. 2571RZ using a duplicate Ohio Certificate of Title for another car, and placed these tags on the above stolen Oldsmobile."

As to the first element of the offense: knowledge of the actual commission of a felony cognizable by a Court of the United States, the indictment states:

"That GEORGE IRVING NORMAN, JR., the defendant herein, at Dayton, Ohio, within the Western Division of the Southern District of Ohio, having knowledge of the actual commission of a felony cognizable by a Court of the United States, to-wit: Section 2312, Title 18, U.S.C., Interstate transportation of a stolen 1948 Oldsmobile, Motor No. 9-7001H from Chicago, Illinois, to Dayton, Ohio on February 16, 1952, the said William Moore well knowing the car to have been stolen; ...."

Counsel for defendant has argued that the indictment fails to charge defendant with "knowledge" that the car involved was stolen. Counsel argues that the indictment simply states:

> "... the said William Moore, well knowing the car to have been stolen..."

It may well be true that the indictment would have been better drawn had it read

> "... the said George Irving Norman, Jr. well knowing the car to have been stolen..."

However, the indictment does state:

> "That GEORGE IRVING NORMAN, JR. ... having knowledge of the actual commission of a felony cognizable by a Court of the United States... Interstate transportation of a stolen 1948 Oldsmobile..."

The Court finds that the foregoing language is sufficient to charge the defendant with "knowledge" the car involved was stolen. Since the attack on the subject indictment has been raised after the time for appeal has passed, the indictment must be liberally construed in favor of its stating an offense. In United States v. Thompson, 356 F.2d 216, 226-227 (2 Cir. 1965) the Court stated:

> "... the courts of the United States long ago withdrew their hospitality toward technical claims of invalidity of an indictment first raised after trial, absent a clear showing of substantial prejudice to the accused--such as a showing that the indictment is 'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.' Finn v. United States, 256 F.2d 304, 307-308 (4 Cir. 1958) [citing numerous cases]...."

As to the second element of the offense, failure as soon as possible to make known to the designated authority the commission of a felony, and the third element of the offense, concealment,

a mere reading of the indictment shows its sufficiency.

As previously noted, counsel for defendant has alleged that the indictment was legally insufficient because it contained no allegations that the defendant had intended to obstruct and hinder the due course of justice and to cause a felon to escape punishment. Counsel states that such allegations are necessary and cites the case of State v. Wilson, 80 Vt. 249, 67 A. 533 (1907) in support of the proposition. This Court is not concerned with the misprison (sic) of felony statute of Vermont but is only concerned with the Federal Statute and the requirements it prescribed. Accordingly, this allegation of legal insufficiency is not well taken.

In accordance with the foregoing, the Court finds that the motion in the nature of an application for a writ of error corum (sic) nobis should be and it hereby is DENIED.

The Court has carefully reviewed all the federal cases involving misprison (sic) of a felony cited by counsel for the United States of America and counsel for defendant and finds that the indictment here under consideration was not legally defective. [1] The Court has decided the foregoing upon examination of the subject indictment and the applicable law.

The Court considered irrelevant to the present action the statements made by Francis R. Salazar, counsel for defendant, regarding de-

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[1]Neal v. United States, 102 F.2d 643, (8 Cir. 1939); Bratton v. United States, 73 F.2d 795 (10 Cir. 1934); United States v. Worchester, 190 F.Supp. 548 (D.C. Mass. 1961); United States v. Thornton, 178 F. Supp. 42 (D.C.E.D.N.Y. 1959) and United States v. Farrar, 38 F.2d 515 (D.C. Mass. 1930).

fendant's excellent reputation during recent years. However, counsel advised the Court in a conference with Roger J. Makley, the Assistant United States Attorney, Mr. Salazar and the Court, that this conviction was the sole felony conviction against defendant and that since his release some 14 years ago Mr. Norman, Jr. had been a fine citizen[2] but that this conviction had caused him a great deal of difficulty with the Federal Communications Commission. In his brief, filed July 25, 1966, Mr. Salazar stated:

> "... the defendant is engaged in various phases of radio broadcasting and is subject to Federal Communications Commission regulations pertaining to radio broadcast licenses. Because defendant stands a convicted felon, by reason of his plea to the void indictment involved in this case, he has encountered difficulties with the Federal Communications Commission in the past and will undoubtedly continue to have additional and further difficulties in the future, so long as the record of conviction stands in this case.... The stigma of such a conviction can have no other effect than an adverse one when one deals with regulatory administrative agency, such as the Federal Communications Commission. The fact than an applicant has been convicted of a felony places him at a very distinct disadvantage, and this is especially true where there is a limited number of licenses granted. A felony conviction, for one of several con-

[2]Mr. Salazar made many references to the fact that defendant's father was a minister. He further stated that defendant had "found religion" and, in fact, that defendant owned a radio station which played mostly religious music.

testing licensed applicants, even if not a proper matter for consideration, could very well be the determining factor....

"A felony conviction is a heavy cross to bear, even if resulting from a trial by jury upon a valid indictment, but no man should be required to suffer the stigma and burden of such a conviction resulting from a plea in his youth of guilty to a void indictment."

Upon a review of the records of this Court, it was discovered that George Irving Norman, Jr., has a felony conviction in this Court for escaping from custody (defendant entered a plea of guilty to this charge on August 26, 1953); therefore, the indictment under attack is not the sole felony conviction as represented by counsel.

The motion decided today was set down for oral argument on September 12, 1966. Subsequent to that date the Court, to its amazement, was advised that on September 2, 1966, ten days before the motion was argued in open Court, George Irving Norman, Jr., along with others, was convicted of the crime of false pretense and conspiracy to commit false pretense in a State court in Colorado. Mr. Salazar represented Mr. Norman, Jr. in that case. The Court has further been advised that prior to July 13, 1966, the day upon which the subject motion was filed, there were pending against Mr. Norman Jr., in the First Judicial District of the State of Colorado:

Criminal action #3599, an indictment for Conspiracy, returned on September 29, 1965,

Criminal action #3600, an indictment for Blackmail, returned on September 29, 1965,

Criminal action #3605, an indictment for Perjury, returned on October 1, 1965,

Criminal action #3606, an indictment for Perjury, returned on October 1, 1965,
Criminal action #3670, an amended indictment for Blackmail, returned on January 11, 1966,
Criminal action #3667, an indictment for Confidence Game, Embezzlement and Conspiracy, returned on January 11, 1966 and
Criminal action #3668, an indictment for Embezzlement, returned on January 11, 1966.

The purpose of enumerating the foregoing is to show that the facts clearly did not warrant Mr. Salazar's representations to this Court that in recent years Mr. Norman, Jr. was a man of high character. His representations to the Court that the conviction which he was attacking was a "heavy cross to bear" was ridiculous in view of Mr. Norman's many confrontations with law enforcement bodies and courts. So false were the words spoken by Mr. Salazar and so derelict was he in his role of officer of this Court by attempting to paint an angelic picture of Mr. Norman, Jr. that this Court would, if Mr. Salazar were admitted to practice before this Court, issue an order to show cause why he should not be denied the privilege of practicing in this Court.[3] Further, this Court would refer this matter to the local bar association for its determination as to whether disbarment proceedings should be instituted.

The Clerk shall enter a copy of this order in Criminal Action 2696, the criminal action containing the indictment involved herein since it has been held that a writ of error coram nobis

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[3]Mr. Salazar was admitted, upon oral motion, to proceed in this case only. This procedure of admitting out-of-state counsel for the purpose of a specific case is customary in federal district courts.

is a step in a criminal case and not the beginning of a separate civil proceeding. United States v. Morgan, 346 U.S. 502 (1953).

Finally, the Clerk shall cause copies of this decision to be forwarded to the Denver Bar Association, the United States District Judge in Denver, Colorado and Edward N. Juhan, District Attorney, First Judicial District, Denver, Colorado for their information.

It is so ORDERED.

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No. 1170

In the Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE IRVING NORMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1952, in the United States District Court for the Southern District of Ohio, petitioner pleaded guilty to an indictment charging misprision of felony in violation of 18 U.S.C. 4, and was sentenced to imprisonment for a year and a day. In 1966, long after service of the sentence had been completed, petitioner sought to have the conviction set aside on motion for a writ of error coram nobis, on the ground that the indictment failed to state an offense. The district court denied the motion (Pet. App. B. 35-43),

and the court of appeals affirmed (Pet. App. A. 31-34).

There is no reason for further review by this Court. Assuming that the validity of an indictment may be reached at all by a motion in the nature of a writ of error coram nobis, the conviction was subject to attack only if the indictment failed, by any intendment, to charge a crime of the class triable in district courts of the United States. *Rosecrans* v. *United States*, 378 F.2d 561, 566 (C.A. 5), and cases there cited. The present indictment (Pet. 3) was clearly adequate under this test.

The elements of the offense of misprision, defined in the leading case of *Neal* v. *United States*, 102 F.2d 643 (C.A. 8), are (1) that a felony was committed by the principal; (2) that the defendant had knowledge of the felony; (3) that he failed to notify the authorities; and (4) that he took affirmative steps to conceal the crime of the principal.[1]

The defect in the indictment on which petitioner seeks to rely is that, in describing the felony of which petitioner was alleged to have actual knowledge, the indictment stated that Moore knew the described car was stolen but did not say that Moore transported it. The indictment did, however, later allege that petitioner took an affirmative step "to conceal the crime

[1] The federal decisions have held that misprision requires an affirmative act of concealment, rather than a mere passive failure to inform, which was enough at common law. See *Bratton* v. *United States*, 73 F.2d 795 (C.A. 10); *United States* v. *Farrar*, 38 F.2d 515 (D. Mass.), affirmed, 281 U.S. 624. Accordingly, there is no need to read into the statute an additional element of intent.

committed by the said William Moore." The fact that the defendant was charged with having known of and concealed the felony of interstate transportation of a stolen car committed by Moore so clearly appeared from the full allegations that the indictment would have been sufficient to withstand attack, even on direct appeal. See *Hagner* v. *United States*, 285 U.S. 427.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1968

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